Mohd Jalani bin Saliman & Anor v Public Prosecutor

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 51-15 OF 1987
ABDUL MALIK ISHAK J
18 JULY 1997

Criminal Law *— Penal Code (Malaysia) — ss 420 & 34 — Cheating — Whether on the facts the offence was made out*

Criminal Procedure *— Judgment — Reasoned judgment — Whether trial judge was required to give reasoned judgment which would include why the defence was called and the findings made thereunder*

Criminal Procedure *— Sentence — Maximum sentence — Justification for — Apportionment of punishment after consideration of all circumstances of the case — Whether sentences imposed by trial court ought to be varied and substituted*

Criminal Procedure *— Trial — Close of prosecution's case — Standard of proof — Whether usage of the phrase 'prima facie' at the close of the case for the prosecution by trial judge had led to a miscarriage of justice — Prosecution's case was decided prior to birth of Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 — Whether prosecution had proved case beyond a reasonable doubt — Whether omission by trial judge, if any, was curable — Criminal Procedure Code (FMS Cap 6) ss 180 & 422*

Evidence *— Witness — Calling of witness by prosecution — Failure to call investigating officer — Exhibits were documentary in nature — Whether such failure was fatal to prosecution's case*

This was an appeal against the decision of the magistrate's court in Johor Bahru which convicted and sentenced both the appellants after a long and protracted trial. The record of appeal showed that the prosecution's case was closed sometime in 1985. The appellants were convicted and sentenced for three charges of cheating punishable under s 420 of the Penal Code (FMS Cap 45) ('the Code') read with s 34 of the Code.

The appeal was advanced on the basis of a number of arguments. Among them, the appellants submitted that the trial court had failed to consider that in order to establish an offence under s 420 of the Code, it is required for the prosecution to prove beyond reasonable doubt the allegations made against the appellants. The appellants pointed out that the trial court had instead used the phrase 'prima facie' at the close of the case for the prosecution. This, the appellants argued, had led to a miscarriage of justice. It was also argued that the trial court had erred in not giving a reasoned judgment as to why the defence was called. The appellants put to the court that it was incumbent on the trial court to dissect and itemize the evidence, not just a perusal, thus giving the reasoned judgment. On other points for which the appeal was put forward to, the appellants argued that there was a serious omission by the trial court in not considering s 34 of the Code as it was an important ingredient in proving the intention to cheat. The appellants also argued that the trial court failed to

answer their claim that they did not have the intention to cheat and that the matter was one of breach of contract. It was also submitted that the failure of the trial court to call for the investigating officer to give evidence was fatal for the case for the prosecution. The court was also asked to review the sentences meted out against the appellants since no reasons were advanced by the trial court in sentencing them.

Held, dismissing the appeal but varying and substituting the sentences:

(1) In this case, the appellants who were duly represented before the trial court had a fair trial, where from the tenor of the evidence adduced, the prosecution had overwhelmingly established all the ingredients of the charges levelled against them. The choice of words by the trial court so as to put the forefront the prima facie test (as compared to the beyond reasonable test) was necessitated by the prevailing law at the material time and consequently there was no miscarriage of justice at all. The evidence adduced, so overwhelmingly strong, had in fact established the case beyond reasonable doubt. Indeed if there was an omission by the trial court (which was not the case here) that omission was curable under s 422 of the Criminal Procedure Code (FMS Cap 6).

The evidence led by the prosecution before the trial court was overwhelmingly strong and cogent. Therefore, the prosecution had adduced evidence in accordance with the burden of proof as envisaged in *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1. On the facts of the case, the guilt of the appellants as found by the trial court was correct in law and in fact (see pp 563I, 564A–C and 580G); *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 distinguished; *Tan Boon Kean v PP* [1995] 3 MLJ 514 and *Nicholas Webb Edwards* (1983) 77 Cr App R 5 followed.

(2) Magistrates need not write lengthy judgments in the course of their duties. There is no statutory provision that requires the trial judge to expressly record the reasons for calling the defence. Suffice if magistrates put the facts and the law on paper as concisely as possible. Although the trial court did not give an explanation as to the law involved, the findings were in accordance with the law that the appellants had committed the offences with which they were charged. What amounts to a 'speaking judgment' varies from case to case (see p 565B–D); *Murugaiah v PP* [1941] MLJ 17 distinguished; *Junaidi bin Abdullah v PP* [1993] 3 MLJ 217 followed.

(3) Common intention could be seen from the conduct of both the appellants who were the managing director and the general manager of a company. In the appeal records, it was shown that the trial court did consider s 34 of the Code (see p 577C–H).

(4) The failure to call the investigating officer was not fatal as the exhibits were documentary in nature, unlike drug cases where the movements of the drugs were essential in the unfolding of

A evidence by the prosecution. Further, the petition of appeal did not specifically itemize the non-calling of the officers in charge of the investigation as a ground to support the appellants' appeal (see pp 577I and 578D–G); *Teoh Hoe Chye v PP; Yeap Teong Tean v PP* [1987] 1 MLJ 220 distinguished; *Yan Wing Lee v PP* [1994] 2 CLJ 453 followed.

B (5) The extent of the punishment has to be judged upon the circumstances of each case and the court should not award the maximum punishment laid down for an offence, but should apportion the punishment after considering all the circumstances having a bearing upon it. In this case, the sentences were varied C and substituted accordingly (see p 583A–F); *Jainarain Sah v Emperor* AIR 1944 Pat 16; *Kher Singh v Emperor* (1928) 30 Punj LR 638; *Adamji Umar v Bombay State* AIR 1952 SC 14; *Dulla v State* AIR 1958 All 198; *State of Kapur Singh* (1953) Cr LJ 1261; *Shanmuga Koduman v Emperor* 31 Cr LJ 477; *Siba Prasad Moda* D *v State of Orissa* AIR 1951 Orissa 259; *Nanhi Gond v Emperor* AIR 1927 Nag 221; *Madan Lal v State of Maharashtra* AIR 1968 SC 1267; *Emperor v Maiku* AIR 1930 All 279 and *Harnam Singh v Emperor* AIR 1926 Lah 239 followed.

Obiter:

E The petition of appeal must incorporate all the points that the appellants proposed to advance before the court. The appellants' counsel should submit solely on the points of law or fact as set out in the petition of appeal and should not stray beyond that (see p 578G–I); *Yan Wing Lee v PP* [1994] 2 CLJ 453 followed.

F

[Bahasa Malaysia summary

Ini merupakan suatu rayuan terhadap keputusan mahkamah majistret di Johor Bahru untuk menyabit dan menghukum kedua-dua perayu selepas perbicaraan yang lama dan berlarutan. Rekod rayuan G menunjukkan bahawa kes pendakwaan ditutup dalam tahun 1985. Perayu-perayu disabit dan dihukum untuk tiga pertuduhan menipu yang boleh dihukum di bawah s 420 Kanun Keseksaan (NMB Bab 45) ('Kanun tersebut') dibaca dengan s 34 Kanun tersebut.

Rayuan dikemukakan berdasarkan beberapa hujah. Di antaranya, perayu-perayu berhujah bahawa mahkamah perbicaraan telah gagal H mempertimbangkan bahawa bagi menunjukkan satu kesalahan di bawah s 420 Kanun tersebut, pihak pendakwaan perlu membuktikan pengataan yang dibuat terhadap perayu-perayu melampaui keraguan munasabah. Perayu-perayu menegaskan bahawa mahkamah perbicaraan telah sebaliknya menggunakan ungkapan 'prima facie' I di penutup kes pihak pendakwaan. Perayu-perayu menghujahkan ini telah membawa kepada salah laksana keadilan. Ia juga dihujahkan bahawa mahkamah perbicaraan tersilap dalam tidak memberikan penghakiman yang berdasarkan logik berkaitan mengapa pembelaan

dipanggil. Perayu-perayu mengemukakan kepada mahkamah bahawa ianya adalah kewajipan mahkamah perbicaraan untuk mengkaji dengan teliti dan menyenaraikan keterangan, bukannya sekadar penelitian, justeru itu memberikan penghakiman yang berdasarkan logik. Tentang hujah lain atas mana rayuan didasarkan, perayu-perayu menghujahkan bahawa terdapat peninggalan serius oleh mahkamah perbicaraan dalam tidak mempertimbangkan s 34 Kanun tersebut kerana ia merupakan suatu unsur yang penting dalam membuktikan niat menipu. Perayu-perayu juga menghujahkan bahawa mahkamah perbicaraan gagal menjawab tuntutan mereka bahawa mereka tidak berhasrat menipu dan bahawa perkara itu merupakan kemungkiran kontrak. Ia juga dihujahkan bahawa kegagalan mahkamah perbicaraan untuk memanggil pegawai penyiasat supaya memberi keterangan adalah padah kepada kes pihak pendakwaan. Mahkamah juga diminta mengkaji semula hukuman yang dikenakan terhadap perayu-perayu memandangkan tiada alasan dikemukakan oleh mahkamah perbicaraan dalam menjatuhkan hukuman.

Diputuskan, menolak rayuan tetapi mengubah dan mengganti hukuman:

(1) Dalam kes ini, perayu-perayu yang diwakili di hadapan mahkamah perbicaraan telah diberikan perbicaraan adil, di mana daripada perjalanan keterangan yang dikemukakan, pihak pendakwaan telah membuktikan dengan jelas sekali segala unsur pertuduhan yang dibuat terhadap mereka. Pilihan kata-kata oleh mahkamah perbicaraan bagi mengutarakan ujian prima facie (berbanding dengan ujian melampaui keraguan munasabah) disebabkan oleh undang-undang yang berkuasa pada masa material dan lantaran itu tidak terdapat salah laksana keadilan sama sekali. Keterangan yang dikemukakan, yang begitu kukuh sekali, pada hakikatnya telah membuktikan kes melampaui keraguan munasabah. Malah jika terdapat suatu peninggalan oleh mahkamah perbicaraan (yang bukan kes demikian di sini) peninggalan itu boleh dipulihkan di bawah s 422 Kanun Acara Jenayah (NMB Bab 6).

Keterangan yang dikemukakan oleh pihak pendakwaan di hadapan mahkamah perbicaraan adalah amat kukuh dan meyakinkan. Oleh yang demikian, pihak pendakwaan telah mengemukakan keterangan menurut beban membukti seperti yang dibayangkan dalam *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1. Atas fakta kes, kesalahan perayu-perayu seperti yang didapati oleh mahkamah perbicaraan adalah betul dari segi undang-undang dan fakta (lihat ms 563I, 564A–C dan 580G); *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 dibeza; *Tan Boon Kean v PP* [1995] 3 MLJ 514 dan *Nicholas Webb Edwards* (1983) 77 Cr App R 5 diikut.

(2) Majistret tidak perlu menulis penghakiman yang panjang lebar sewaktu menjalankan tugas mereka. Tiada sebarang peruntukan statutori yang menghendaki hakim perbicaraan merekodkan secara nyata alasan untuk memanggil pembelaan. Adalah memadai jika

majistret menulis fakta dan undang-undang seberapa tepat yang boleh. Walaupun mahkamah perbicaraan tidak memberikan sebarang penjelasan tentang undang-undang yang terlibat, pendapat adalah menurut undang-undang bahawa perayu-perayu telah melakukan kesalahan yang mana mereka telah dipertuduhkan. Apa yang merupakan 'speaking judgment' berubah dari kes ke kes (lihat ms 565B–D); *Murugaiah v PP* [1941] MLJ 17 dibeza; *Junaidi bin Abdullah v PP* [1993] 3 MLJ 217 diikut.

(3) Niat umum boleh dilihat daripada tindak-tanduk kedua-dua perayu yang merupakan pengarah urusan dan pengurus besar sebuah syarikat. Dalam rekod rayuan, ia ditunjukkan bahawa mahkamah perbicaraan memang telah mempertimbangkan s 34 Kanun tersebut (lihat ms 577C–H).

(4) Kegagalan untuk memanggil pegawai penyiasat tidak padah kerana ekshibit adalah bersifat dokumentar, berbeza dengan kes dadah di mana gerakan dadah adalah perlu dalam membentangkan keterangan oleh pihak pendakwaan. Seterusnya, petisyen rayuan tidak menyenaraikan secara khusus ketakpanggilan pegawai yang bertanggungjawab atas penyiasatan sebagai alasan bagi menyokong rayuan perayu-perayu (lihat ms 577I dan 578D–G); *Teoh Hoe Chye v PP; Yeap Teong Tean v PP* [1987] 1 MLJ 220 dibeza; *Yan Wing Lee v PP* [1994] 2 CLJ 453 diikut.

(5) Takat hukuman haruslah dinilai atas keadaan setiap kes dan mahkamah tidak patut mengawardkan hukuman maksima yang dinyatakan untuk suatu kesalahan, tetapi harus mengumpukkan hukuman selepas mempertimbangkan kesemua keadaan yang berkaitan dengannya. Dalam kes ini, hukuman diubah dan diganti sewajarnya (lihat ms 583A–F); *Jainarain Sah v Emperor* AIR 1944 Pat 16; *Kher Singh v Emperor* (1928) 30 Punj LR 638; *Adamji Umar v Bombay State* AIR 1952 SC 14; *Dulla v State* AIR 1958 All 198; *State of Kapur Singh* (1953) Cr LJ 1261; *Shanmuga Koduman v Emperor* 31 Cr LJ 477; *Siba Prasad Moda v State of Orissa* AIR 1951 Orissa 259; *Nanhi Gond v Emperor* AIR 1927 Nag 221; *Madan Lal v State of Maharashtra* AIR 1968 SC 1267; *Emperor v Maiku* AIR 1930 All 279 dan *Harnam Singh v Emperor* AIR 1926 Lah 239 diikut.

Obiter:

Petisyen rayuan mestilah menggabungkan semua hujah yang ingin dikemukakan oleh perayu-perayu di hadapan mahkamah. Peguam perayu-perayu harus berhujah atas hujah undang-undang atau fakta sahaja seperti yang dinyatakan dalam petisyen rayuan dan tidak patut menyimpang lebih dari itu (lihat ms 578G–I); *Yan Wing Lee v PP* [1994] 2 CLJ 453 diikut.]

Notes

For cases on close of prosecution's case, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2899–2915.

For cases on judgment, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1431–1478.

For cases on cheating, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1260–1277.

For cases on the calling of witness by the prosecution, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1643–1656.

Cases referred to

Adamji Umar v State of Bombay AIR 1952 SC 14 (folld)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (distd)
Baburam Rai (1905) 32 Cal 775 (refd)
Balasingham v PP [1959] MLJ 193 (refd)
Byrne v Kinematograph Renters Society Ltd [1958] 2 All ER 579 (refd)
Dick GW AIR 1914 All 538 (refd)
Dulla v State AIR 1958 All 198 (folld)
Emperor v Maiku AIR 1930 All 279 (folld)
Harnam Singh v Emperor AIR 1926 Lah 239 (folld)
Haw Tua Tau v PP [1981] 2 MLJ 49; [1982] AC 136 (refd)
Hemraj (1910) 11 Cri LJ 295 (refd)
Jainarain Sah v Emperor AIR 1944 Pat 16 (folld)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217 (folld)
KJ Barlow v PP; BG Chambers v PP [1986] 2 MLJ 104 (refd)
Kher Singh v Emperor (1928) 30 Punj LR 638 (folld)
Khoo Hi Chiang v PP [1994] 1 MLJ 265 (refd)
Liew Min Poh v PP [1962] 3 MC 316 (refd)
Madan Lal Ramchandra Daga v State of Maharashtra AIR 1968 SC 1267 (folld)
Mahbub Shah v King Emperor 72 IA 148 (refd)
Mobarik Ali Ahmad v State of Bombay AIR 1957 SC 857 (refd)
Mohamed Din v PP [1985] 2 MLJ 251 (refd)
Mohamed bin Kasdi v PP [1969] 1 MLJ 135 (refd)
Mraz v R (1955) 93 CLR 493 (refd)
Murugaiah v PP [1941] MLJ 17 (distd)
Nanhi Gond v Emperor AIR 1927 Nag 221 (folld)
Nayak RS v Antulay AR (1986) SCC (Cri) 256 (refd)
New Tuck Shen v PP [1982] 1 MLJ 27 (refd)
Nicholas Webb Edwards (1983) 77 Cr App R 5 (folld)
PP v Mansor bin Md Rashid & Anor Criminal Trial No 58–10–92 (unreported) (refd)
PP v Mohamed Fathi [1979] 2 MLJ 70 (refd)
R v Goss (1860) 8 Cox 262 (refd)
Ragunathan v Pendakwa Raya [1982] 1 MLJ 139 (refd)
Shably bin Ahmad v PP 4 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1260 (refd)
Shanmuga Koduman v Emperor 31 Cr LJ 477 (folld)
Siba Prasad Moda v State of Orissa AIR 1951 Orissa 259 (folld)
See Yew Poo v PP [1949] MLJ 131 (refd)

Solomon Ezekiel (1939) 69 CLJ 298; 41 Cri LJ 255; AIR 1939 Cal 376 (refd)
State of Kapur Singh (1953) Cr LJ 1261 (folld)
State of Orissa v Laba (1964) Cut LT 253 (refd)
Tan Boon Kean v PP [1995] 3 MLJ 514 (folld)
Tee Thian See v PP [1997] J Cr 239 (refd)
Teoh Hoe Chye v PP; Yeap Teong Tean v PP [1987] 1 MLJ 220 (distd)
Yan Wing Lee v PP [1994] 2 CLJ 453 (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 60(1), 92(1)
Criminal Procedure Code (FMS Cap 6) ss 180, 422
Penal Code (FMS Cap 45) ss 24, 25, 415, 420

Karpal Singh (*Karpal Singh & Co*) for the appellants.
Amelia Tee Hong Geok bte Abdullah (Senior Deputy Public Prosecutor, State Legal Adviser's Chambers, Johor Bahru) for the respondent.

Abdul Malik Ishak J:

Preliminary matters

This was an appeal from the decision of the learned magistrate of the Magistrate's Court at Johor Bahru ('the trial court') who convicted and sentenced both the appellants after a long and protracted trial. The appeal records were quite voluminous and it was not an easy task to peruse through them. It is significant to mention at the outset that initially there were a number of separate cases and charges involving both the appellants and one other individual by the name of Chin Him Cheong @ Robert Chin ('Robert Chin'). Several adjournments were granted with charges being amended to suit the occasion. Finally, at p 38 of the appeal record, it was recorded that the prosecution decided to proceed with two cases, viz, A43/83 and A432/81 while the other cases were stood down pending the outcome of these two cases. Amended charges were then tendered as exh P1.

To put matters in perspective, it is appropriate to say that there were three charges framed against each of the appellants and Robert Chin. On 22 December 1986, the trial court convicted and sentenced each of the appellants and Robert Chin as follows:

Each of the first and second appellants

First charge: Seven years' imprisonment and a fine of RM5,000 in default one year's imprisonment.

Second charge: Seven years' imprisonment and a fine of RM10,000 in default one year's imprisonment.

Third charge: Seven years' imprisonment and a fine of RM5,000 in default one year's imprisonment.

These sentences were ordered by the trial court to run concurrently.

Robert Chin

The same sentences were imposed on him in respect of the three charges except that the sentences were ordered by the trial court to run with effect from the date of arrest.

As I said, both the appellants have appealed against their convictions and sentences. Robert Chin took the convictions and sentences for the three charges within his stride and he appeared contented as there was no appeal forthcoming from him.

The petition of appeal itemized quite a number of grounds but the bulk of it were not pursued by the appellants. Thus, what was not pursued at the appeal proper must, consequently, be considered to be withdrawn. It was with this scenario in mind that I proceeded to hear the appeal.

Standard of proof

An argument was advanced that the trial court failed to note that the ingredients required to be proved to establish an offence under s 420 of the Penal Code (FMS Cap 45) ('the Code') had not been proved beyond reasonable doubt. It was said that this was a crucial ground, a determining factor, that would decide the fate of the appellants. The classical case of *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 (FC) affirmed the celebrated case of *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 (SC) in that at the close of the prosecution's case the court must be satisfied after a maximum evaluation of the prosecution's evidence that the case has been proved against the accused beyond reasonable doubt. Put differently, the standard of proof required from the prosecution at the close of its case in a non-jury trial in Malaysia, having regard to the statutory formula in s 180 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), is the usual standard of proof, to wit, the beyond all reasonable doubt standard of proof, which called for a maximum evaluation of the evidence tendered by the prosecution. In *Arulpragasan*, Eusoff Chin Chief Justice succinctly said (at p 11):

> The burden is on the prosecution to prove every ingredient which constitutes the offence with which the accused is charged. When, at the close of the case for the prosecution, every ingredient is proved, then there is a case for the accused to answer.
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> When the case for the prosecution is concluded, it is the duty of the court to scrutinize and evaluate the evidence whether or not there is a case for the accused to answer. If there is no case to answer, the court will acquit and discharge the accused person. If there is a case to answer, then the court will call on the accused to enter on his defence.

Applying *Arulpragasan*, it was sought to argue that the trial court had applied the wrong standard of proof. It was submitted that there was a clear misdirection in law when the trial court at the end of the case for the prosecution said at p 192 of the appeal record:

> This has been a lengthy hearing and after having heard the prosecution, counsel for the first, second and the third accused and after having perused

A the massive sets of documents, the court is satisfied that the prosecution has made out a prima facie case against the first, second and third accused persons, who are therefore called to enter their defence.

References to two other passages in the judgment of the trial court were made to drive home the point that misdirections in law were blatantly B made. Thus, at p 284 of the appeal record, in its judgment, the trial court remarked:

> The court was also satisfied after having perused the document(s) and heard the witnesses that the facts contained therein were not true.

That, at p 283 of the appeal record, the trial court in its judgment said:

C

> In the first charge, the court is satisfied ... .

I will now proceed to highlight certain passages in the judgment of the trial court which was said to run counter to *Arulpragasan*. Thus, at p 285 of the appeal record, the judgment of the trial court contained this passage:

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> The court is also satisfied that these documents were presented to the bank and that they contain[ed] facts which were not true.

Further down the same page, the trial court continued in its judgment:

> It is also established that Shetraco operated Account No 6779 at UMBC ... .

E Finally, further down the same page the appeal record showed the following sentence:

> As to the third accused, the court is satisfied that the prosecutor had established that the third accused was the owner of Maginco Shipping Lane [it should be 'Line'] and was operated by him.

F It was pointed out that by the use of the words 'satisfied' and 'established', there was nothing to show whether the trial court took into account the prima facie standard or the 'beyond all reasonable doubt' standard of proof. That was a novel submission and at first blush it was quite an attractive submission. On closer scrutiny of the appeal record, particularly G at p 192, the trial court did use the words 'prima facie' at the close of the case for the prosecution. It was worded thus:

> ... after having perused the massive sets of documents, the court is satisfied that the prosecution has made out a prima facie case against the first, second and third accused persons, who are therefore called to enter their defence.

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Now, it must be emphasized that when the trial court used the phrase 'prima facie' it was done before the birth of *Arulpragasan*. In fact, the appeal record showed that the use of that phrase was adopted when the trial court was in session and at the end of submissions of all the parties at the close of the case for the prosecution. At p 185 of the appeal record, the I date was boldly typed as '5 October 1985'. That was the crucial date to consider. On that date, the law then applicable on the issue of the standard of proof at the close of the case for the prosecution was the case of *Haw Tua Tau v PP* [1981] 2 MLJ 49; [1982] AC 136 which was dutifully

followed by *Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139 — the prima facie test. At that point of time, the prima facie test was the test laid down by the highest court in the country. The doctrine of stare decisis would come into play so as to bind all the subordinate courts thereto. What could the trial court do in the face of the then prevailing law in the country? Must the trial court proceed in the opposite direction and not follow the time-honoured doctrine of stare decisis?

With the arrival of *Khoo Hi Chiang*, the prima facie test was eroded and substituted by the 'beyond all reasonable doubt' test. *Khoo Hi Chiang* laid down the new approach required for the standard of proof: the duty of the court, at the close of the case for the prosecution, was to undertake not a minimal evaluation of the evidence tendered by the prosecution in order to determine whether or not the prosecution evidence was inherently incredible — the *Haw Tua Tau* test — but rather a maximum evaluation of such evidence to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt. Even in the case of *Tan Boon Kean v PP* [1995] 3 MLJ 514, a three-member panel (Mohd Azmi, Wan Yahya FCJJ and Zakaria Yatim JCA) of the Federal Court (the successor of the Supreme Court) correctly recognized that it was bound by the ratio of *Khoo Hi Chiang* where the unanimous decision of a five-member panel (Abdul Hamid Omar LP, Jemuri Serjan CJ (Borneo), Edgar Joseph Jr, Eusoff Chin and Mohd Dzaiddin SCJJ) decided on the standard of proof required from the prosecution at the close of its case under s 180 of the CPC. *Arulpragasan* affirmed *Khoo Hi Chiang* and established once and for all the 'beyond reasonable doubt' test. The learned deputy public prosecutor in the person of Datin Amelia Tee Hong Geok bte Abdullah rightly submitted that in determining this appeal in 1997 on the decision of the trial court that was made in 1985, I should go beyond looking at the use of the words 'prima facie case' and should not be overly concerned with the question of what was the test to be applied then. It was rightly urged upon me that I should look at whether in the light of all the evidence adduced in the course of the case for the prosecution that the prosecution had succeeded in making out a case beyond all reasonable doubt. My attention was drawn to the proviso in s 60(1) of the Courts of Judicature Act 1964 ('the CJA') where it was enacted:

> ... that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

It is significant to note that a similar proviso appears in s 92(1) of the CJA giving similar powers to the Federal Court. It is also significant to note that no such proviso exists for the High Court in the CJA but notwithstanding this significant absence, s 422 of the CPC enacts, inter alia, that no finding or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of any error, omission or irregularity in the judgment unless such error, omission or irregularity has occasioned a failure of justice. In short, s 422 of the CPC would cure any error,

omission or irregularity so long as there was no failure of justice occasioned by it. By way of an analogy, reference may be made to two cases. In *See Yew Poo v PP* [1949] MLJ 131, the Court of Appeal agreed with Terrell J that on the facts of the case, each of the offences could have been the subject of a separate charge, and could have proceeded at one trial and consequently, the duplicity was said to be a mere irregularity which could be cured provided the accused was not prejudiced and there was no failure of justice occasioned by that irregularity. However, the court found that there was a failure of justice in the case, and consequently, the irregularity could not be cured. In *PP v Mohamed Fathi* [1979] 2 MLJ 70, Harun J (later SCJ) referred to and approved the approach adopted in *See Yew Poo*. On the facts of that case, Harun J held that since the accused was neither prejudiced nor had there been a failure of justice, the charge though bad for duplicity, was an irregularity which was cured by s 422 of the CPC. It is germane, at this juncture, to ascertain the meaning behind the phrase 'miscarriage of justice'. For a start, reference should be made to the case of *Nicholas Webb Edwards* (1983) 77 Cr App R 5 where Robert Goff LJ speaking for the Court of Appeal said:

> It is plain that the failure of the judge to direct the jury on the standard of proof was a serious defect in the summing-up. We do not consider that this defect can be cured by the fact that counsel for the prosecution and for the defence referred to the standard of proof, nor by the fact that this was an experienced jury. In our judgment, it is clearly the duty of the judge to direct the jury on the standard of proof so as to ensure that that direction is heard by the jury in each criminal trial, with the authority which only the judge can give to such a direction.
>
> That being so, we have to consider whether we should exercise our powers under the proviso to s 2(1) of the Criminal Appeal Act 1968 to dismiss the appeal if we consider that no miscarriage of justice has actually occurred.
>
> We consider this question on the basis that there is no absolute rule excluding the operation of the proviso in a case of this kind. Counsel for the appellant did not submit that there was any such absolute rule. With this we agree. At one time we were troubled by the decision of this court in *Oliva* (1961) 46 Cr App R 241, which appeared to indicate that where there had been a failure to direct the jury on the burden of proof, though not on the standard of proof, the requirement that the judge should direct the jury on the burden of proof was regarded as so fundamental that if he fails to do so the court will, as a matter of principle, decline to exercise the proviso. But after the hearing, we discovered that in two later cases, reported in the same volume of Criminal Appeal Reports, viz *Slinger* (1961) 46 Cr App R 244, and *Sparrow* (1962) 46 Cr App R 288, the court soon abandoned that view. From those cases, it appears that in such a case, as in any other, the court must consider the operation of the proviso in the light of the particular facts of the case. There are various formulations in the cases of the principle underlying the proviso. We shall, adopting the words of Viscount Simon LC in *Stirland v Director of Public Prosecutions* (1944) 30 Cr App R 40 at p 47; (1944) AC 315 at p 321, ask ourselves whether on the evidence a reasonable jury, properly directed on the standard of proof, would without doubt have convicted the appellant.

> The evidence against the appellant was, in our judgment, overwhelming. Intercourse was admitted. The only questions were: (i) whether the girl consented and, if she did not; (ii) whether the appellant either knew that she did not or was reckless whether she did so or not. This was a case where there was the most abundant corroboration of the complainant's evidence. The appellant admitted having been in possession of a knife, and admitted having displayed it close to the girl's face while he was lying on top of her. He was later to lie about the identity of the car; and there was evidence that when arrested he attempted to throw away the knife in order to conceal it. He admitted the knife at the trial. But, transcending that, there was evidence from police officers that not only did he admit raping the complainant when he was arrested, but also that he made two statements to the police under caution admitting the offence. It is true that at the trial the appellant challenged the veracity of those statements on the grounds we have indicated. But that challenge, unconvincing in itself, was wholly undermined by the terms of the letter which he wrote to the complainant from prison while awaiting trial. This letter, which was beyond dispute voluntary, was in terms entirely consistent with the confessions which he had made, and entirely inconsistent with any suggestion that he was being falsely accused by the girl. We were referred by Mr Hordern for the appellant to some points which could be, and obviously were, made on his behalf. But these paled into insignificance beside the overwhelming evidence for the prosecution. We have no hesitation in concluding that, despite the serious omission of the judge, this was indeed a case where beyond all doubt a reasonable jury, if properly directed, would on the evidence have convicted the appellant.
>
> For these reasons we shall operate the proviso; and it follows that the appeal against conviction will be dismissed.

It is clear from the judgment of Robert Goff LJ in *Nicholas Webb Edwards* that although Blomefield J had merely directed the jury on the burden of proof and omitted to direct them on the standard of proof, yet the Court of Appeal was prepared to apply the proviso to s 2(1) of the Criminal Appeal Act 1968 to dismiss the appellant's appeal as they considered that no miscarriage of justice had actually occurred because the evidence was overwhelmingly strong and cogent against the appellant.

In *Mohamed Din v PP* [1985] 2 MLJ 251, Gunn Chit Tuan J (later CJ (Malaya)) referred to and made reference to the case of *Mraz v R* (1955) 93 CLR 493 at p 514, when his Lordship considered the meaning of the term 'miscarriage of justice'. This was what his Lordship said (at pp 256–257):

> No finding, sentence or order passed by a subordinate court should be reversed or altered on account of any error in the judgment of that court unless such error has occasioned a failure of justice (s 422 of the Criminal Procedure Code (FMS Cap 6)). It was the submission of counsel for the appellant that there were errors in the judgment of the lower court which have resulted in a failure of justice in this case. Counsel on both sides informed the court that they have not been able to find any Malaysian authority on what is meant by 'failure of justice'. Counsel for the appellant, however, did refer me to the following passage of Fullagar J in the High Court of Australia case of *Mraz v R* (1955) 93 CLR 493 at p 514 concerning the meaning of the expression 'miscarriage of justice' in s 6(1) of the New South Wales Criminal Appeal Act of 1912:

> 'It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.'

Mr Sri Ram also referred to the following passage in the judgment of Hegde J in the Indian case of *Krishna Murthy v Abdul Subban* [1965] 1 Cr LJ 565 at p 576:

> 'The expression "a failure of justice has in fact occasioned thereby" found in s 535(1) [of the Indian Criminal Procedure Code] does not connote that the court should be of the opinion that an innocent person has been convicted or the case against the accused person is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For that purpose, the legislature need not have introduced the conception of "failure of justice" in ss 535 and 537 [of the Indian Criminal Procedure Code]. The 'failure of justice' mentioned therein is that occasioned by the contravention of the provisions in Ch XIX [of the Indian Criminal Procedure Code]. In law, the expression "justice" comprehends not merely a just decision but also a fair trial. Sections 535 and 537 have primarily in view a fair trial. For the purpose of those sections, a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.'

I would respectfully agree with the above dicta of their Lordships in the High Courts of Australia and India and in so far as our present case is concerned I agreed that the appellant did not have a trial in which the relevant law has been strictly followed and has therefore lost a chance which was fairly open to him of being acquitted.

The requirements of natural justice are endless. Reference may be made to the case of *Byrne v Kinematograph Renters Society Ltd & Ors* [1958] 2 All ER 579 at p 599 where Harman J listed the requirements of natural justice in this way:

> What then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more.

In my judgment, the appellants who were duly represented before the trial court had a fair trial, where from the tenor of the evidence adduced, the

prosecution had overwhelmingly established all the ingredients of the charges levelled against them. As I said, the choice of words by the trial court so as to put to the forefront the prima facie test was necessitated by the prevailing law at the material time and consequently there was no miscarriage of justice at all. The evidence adduced, so overwhelmingly strong, had in fact established the case beyond reasonable doubt. Indeed, if there was an omission by the trial court (which was not the case here) that omission was curable under s 422 of the CPC.

Next, it was argued that the trial court erred in not giving a reasoned judgment as to why the defence was called. A submission was advanced that the trial court appeared to have considered the evidence as a whole and not at two stages, namely, at the close of the case for the prosecution and at the close of the case for the defence. The law, it was submitted, required the trial court to give a reasoned judgment which would include why the defence was called and the findings made thereunder. Reliance was placed on the decision of Ismail Khan J in the case of *Balasingham v PP* [1959] MLJ 193 where his Lordship said at p 194:

> An appeal is merely a continuation of proceedings by way of rehearing and litigants as well as the appellate court are entitled to know the reasons for the finding.
>
> The trial court is under a statutory obligation under s 308 of the Criminal Procedure Code to transmit to the appellate court the grounds of decision which convey to my mind a reasoned judgment on the facts and the law not merely the conclusion arrived at. The advantage of a 'speaking' judgment needs no emphasis. In fact, in *Murugiah v PP* [1941] MLJ 17 and *PP v Low Toh Seng* [1941] MLJ 1, Horne J and Terrell Ag CJ felt that the absence of reasons indicates the possibility that such vital consideration as the weight of evidence and the possibilities of the case may not have influenced the mental process of the trial judge in arriving at the ultimate finding.

My attention was drawn to the case of *Murugiah v PP* [1941] MLJ 17 where Horne J in a short judgment said (at p 18):

> It does not appear to me that a magistrate complies with s 307(iii) of the Criminal Procedure Code which requires him to give the 'Grounds of Decision' by stating 'I believe the evidence of the prosecution' ... 'I believe the evidence of the accused'. I think the magistrate should state, except in the simplest of cases and they usually are not the subject of appeal, the reasons why he believed or disbelieved the evidence in question.

And flowing from that case, it was argued that the trial court admitted that the case was protracted with massive documents to peruse and not as simple as one would imagine. Therefore, it was submitted that it was incumbent on the trial court to dissect and itemize the evidence for the prosecution on the same lines as that adopted by Salleh Abas LP in *KJ Barlow v PP*; *BG Chambers v PP* [1986] 2 MLJ 104 (SC).

I have read the judgment of the trial court from pp 283–290 of the appeal record. It was a compact judgment that went straight into the subject matter of the charges levied against the appellants. The trial court referred to the relevant exhibits and linked those exhibits with the three

charges. The trial court too highlighted certain aspects of the evidence to link it with the charge of cheating. The judgment of the trial court was not like what was done by the magistrate in *Murugiah*'s case. The judgment of the trial court can never be compared to what the magistrate did in *Murugiah* which received the adverse comments of Horne J. It would be most unfair and wrong to equate the remarks of Horne J in *Murugiah* to the judgment of the trial court. Magistrates need not write lengthy judgments in the course of their duties. Suffice if magistrates put the facts and the law on paper as concisely as possible. In my judgment, there was nothing wrong with the way the trial court wrote the judgment. Although the trial court did not give an explanation as to the law involved yet the findings were in accordance with the law which showed that the appellants had committed the offences with which they were charged (*Tee Thian See v PP* [1997] J Cr 239). What amounts to a 'speaking judgment' varies from case to case and from magistrate to magistrate. Even judges too are apt to differ and hold onto different notions on what can be considered to be a 'speaking judgment'.

It is a correct statement of the law to say — and I so say — that there is no statutory provision that requires the trial magistrate to expressly record the reasons for calling the defence. The Supreme Court in the case of *Junaidi bin Abdullah v PP* [1993] 3 MLJ 217 had occasion to consider the acid issue of whether it was mandatory for the trial judge to record the reasons for calling an accused to enter the defence. In answering the question posed in the negative, Mohd Azmi SCJ (now FCJ) had this to say (at p 223):

> In our opinion, there is also no statutory provision requiring a judge sitting alone to expressly record his reason before calling the accused to enter his defence or to state his findings on the credibility of main prosecution witnesses. But, as a matter of practice, where there is a particular reason for doing so, such as where a submission to answer has been made in a complex case, or where the accused is called to enter a defence on a lesser or alternative charge, judges do sometimes give their reasons. In uncomplicated cases, such as the instant appeal, it is not obligatory or even necessary to do so. By calling an accused to enter his defence, it should be assumed that the trial judge must, on evaluation of the evidence, have been satisfied that the prosecution had, at that stage of the trial, established a prima facie case which, if unrebutted, would warrant a conviction of the accused. To arrive at such a conclusion, it is inherent that the judge must consider all the evidence adduced by the prosecution as tested in cross-examination, on a prima facie basis. In this appeal, the establishment of a prima facie case of unlawful possession of a firearm under s 57 of the [Internal Security Act 1960] was so obvious, even to the defence counsel, that it became academic and unnecessary for the court to consider an order of acquittal under s 180 of the CPC. Thus, when the learned judge called for the defence in the present case, he must have been satisfied that there was a prima facie case to answer which, if unrebutted, would warrant a conviction, and it was not mandatory for him to record the reasons for his satisfaction, even if there had been no concession made by the defence counsel. However, whether the judge was actually correct in law in calling for the defence was of course open for review on appeal to this court. Be that as it may, we hold the view

that mere failure or omission on the part of a trial judge to record his grounds for his findings on credibility of witnesses at that stage of the trial is not sufficient by itself for allowing an appeal, particularly when considered in the light of the provisions of ss 60 and 72 of the Courts of Judicature Act 1964 read together with s 167 of the Evidence Act 1950 and s 422 of the CPC.

Notwithstanding the fact that *Junaidi bin Abdullah* emphasized on the prima facie test at the close of the case for the prosecution, that was the situation that prevailed in 1993 before *Khoo Hi Chiang* came into the fold in 1994 and it was good law then. It is still good law in so far as the case establishes the principle that there is no statutory provision and it is not mandatory for the trial judge, sitting alone, to record his reasons for calling the defence.

The charges

Now to the crux of the matter.

Briefly, the three charges against the appellants were for cheating — an offence punishable under s 420 of the Code read with s 34 of the Code. That they (both the appellants) and Robert Chin and another still at large cheated United Malayan Banking Corp ('UMBC') by deceiving it into believing that certain documents presented to the said bank together with irrevocable letters of credit contained true facts, namely that the goods had in fact been laden on the steamer MV Sim Lee when such facts were not true; and that the appellants knew or had reason to believe that the facts were false; and in so doing they dishonestly induced UMBC into releasing certain sums of money to the credit of Shetraco Trading Sdn Bhd.

In the first charge, the letter of credit concerned was No 5381 dated 24 May 1981 (exh P26) for a sum of US$34,240. The documents presented to UMBC together with the letter of credit were:

(a) Bill of Lading No SL 613/81 dated 11 June 1981 (exh P148) issued by Maginco Shipping Lines Pte Ltd;

(b) Invoice No 1157/6/81 dated 10 June 1981 (exh P118) issued by M/s Shetraco Trading Sdn Bhd, Johor Bahru;

(c) certificate of origin dated 10 June 1981 (exh P14) alleged to have been signed by the President of the Indian Chambers of Commerce, Johor Bahru; and

(d) packing list dated 10 June 1981 (exh P119) issued by M/s Shetraco Trading Sdn Bhd addressed to Rashid Obaid Al Shamsi.

In the second charge, the letter of credit concerned was No SJS 810161 dated 30 May 1981 (exh P24) for the sum of US$71,328. The documents presented to UMBC together with the letter of credit were:

(a) Bill of Lading No SL 636/81 dated 11 June 1981 (exh P150);

(b) Invoice No 1168/6/81 dated 13 June 1981 (exh P124) issued by M/s Shetraco Trading Sdn Bhd, Johor Bahru;

(c) Certificate of Origin dated 13 June 1981 (exh P16) alleged to have been countersigned by the Indian Chambers of Commerce, Johor Bahru; and

(d) packing list dated 13 June 1981 (exh P123) issued by M/s Shetraco Trading Sdn Bhd addressed to M/s Mohd Abdulrehman Zarwani.

In the third charge, the letter of credit concerned was No 1993/3699 dated 20 May 1981 (exh P28) for the sum of US$17,120. The documents presented to UMBC together with the letter of credit were:

(a) Bill of Lading No SL 610/81 dated 11 June 1981 (exh P149);

(b) Invoice No 1160/6/81 dated 11 June 1981 (exh P114) issued by M/s Shetraco Trading Sdn Bhd, Johor Bahru;

(c) certificate of origin dated 11 June 1981 (exh P17) alleged to have been countersigned by the Indian Chambers of Commerce, Johor Bahru; and

(d) packing list dated 11 June 1981 (exh P112A) issued by M/s Shetraco Trading Sdn Bhd addressed to M/s Ahmad Mohd Rafie Hoormodi.

Section 415 of the Code enacts as follows:

> Whoever, by deceiving any person, whether or not such deception was the sole or main inducement —
>
> (a) fraudulently or dishonestly induces the person so deceived to deliver property to any person, or to consent that any person shall retain any property; or
>
> (b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation, or property,
>
> is said to 'cheat'.
>
> *Explanation 1* — A dishonest concealment of facts is a deception within the meaning of this section.
>
> *Explanation 2* — Mere breach of contract is not of itself proof of an original fraudulent intent.
>
> *Explanation 3* — Whoever makes any representation through any person acting as an agent, or otherwise, for him, shall be deemed to have made the representation himself.

There are ten illustrations to s 415 of the Code ranging from (a) to (j). These illustrations serve as useful guidelines to the definition of cheating under s 415 of the Code.

In a nutshell, the ingredients of cheating under s 415 of the Code may be stated as follows:

(1) Deception of any person.

(2) (a) Fraudulently or dishonestly inducing that person —

(i) to deliver any property to any person or

(ii) to consent that any person shall retain any property, or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

There must be deception. That deception must be caused by the accused to generate inducement in the mind of the victim. Deception may be by words or conduct. What is sufficient to constitute deception is dependent on the facts of each case. Deception has an element of misleading. It is inducing a person to believe as true something which is false. In the context of the present appeal, the prosecution has to establish that there was deception of UMBC by the appellants and in consequence of that deception the appellants had induced UMBC to deliver the money. That deception is an essential ingredient can never be doubted. Ali J in *Mohamed bin Kasdi v PP* [1969] 1 MLJ 135 was correct when he held the view that to sustain a charge of cheating, there must be evidence of deception practised upon a person who was dishonestly induced to part with his money. Azmi J in *Liew Min Poh v PP* (1962) 3 MC 316 also stressed the need to establish deception practised by the accused. There it was held that in a charge for the offence of cheating under s 420 of the Code, it was necessary to set out not merely the fact that the accused had obtained goods by dishonest means, but also the deception which had been practised. It is where, in pursuance of the deception, property is delivered by a person cheated that the offence is said to be cheating punishable under s 420 of the Code.

It is said that when a person fraudulently represents as an existing fact that which is not in fact an existing fact commits the offence of cheating. A classical example can be found in the following example often taught in law school. It is this: the seller represents the quantity of coals to be 14 cwt whereas in fact it is only 8 cwt. The seller takes pains to pack the coals in such a way as to make it look more. That would be cheating. Another example would be the case of *R v Goss* (1860) 8 Cox 262 where the seller passes off tasters of cheese as if for real, where it is not so. That would also be cheating.

The word 'fraudulently' is defined in s 25 of the Code to mean: 'A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise'; whereas the word 'dishonestly' is defined in s 24 of the Code to mean:

> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing 'dishonestly'.

The phrases 'wrongful gain' and 'wrongful loss' are defined in s 23 of the Code to mean:

> 'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled.

'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled.

It is crystal clear that the word 'fraudulently' is defined and meant differently from the word 'dishonestly' (*Baburam Rai* (1905) 32 Cal 775 at p 779). These two words do not govern wholly the definition of cheating. The first crucial part would govern the situation that where the person deceived must have been fraudulently or dishonestly induced to deliver any property to any person or to consent that that other person should retain that property. The second crucial part governs the case of a person who by deceiving another intentionally induces the person so deceived to do an act which causes or is likely to cause damage or harm, although the deceiver has not acted fraudulently or dishonestly. Of course, the evidence adduced must establish the existence of the fraudulent or dishonest intention at the time of the commission of the act. In short, the offence of cheating is completed once the culprit obtains possession of the property by a trick (*Dick GW* AIR 1914 All 538 and *Shably bin Ahmad v PP* 4 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1260).

Thus, in practising deception there should be an intention to cause wrongful gain to one person or wrongful loss to another person. It is not necessary that both wrongful gain and wrongful loss should be present. In order to make out an offence of cheating, the presence of the dishonest intention from the very beginning is necessary.

Section 415(b) of the Code makes intentional deceptions punishable as cheats if they cause or are likely to cause any damage or harm whether to property or to reputation. If the deception is intended to cause any damage or harm whatsoever to the person deceived, then it would be sufficient to constitute cheating. Not only must that deception be intended to induce the person deceived to do or omit to do something but as a corollary it must also cause damage to that person. The word 'intentionally' appearing under this branch of the definition of cheating applies to the act or omission which the person deceived is induced to do or omit to do. It is not meant to apply to the situation where the accused person should also have intended to cause harm or damage as a result of such act or omission. However, if the accused intentionally induces the person deceived to do or omit to do anything which he would not do or omit to do if he were not deceived and the act or omission causes damage or harm to that person in body, mind, reputation or property, then it is said that cheating occurs (*Nayak RS v Antulay AR* (1986) SCC (Cri) 256). It is germane to point out that s 415 of the Code and the illustrations thereto do not indicate the meaning to what would constitute causing harm to 'body, mind, reputation'. It is apparent that every illustration thereto is confined to the kind of cheating which causes wrongful gain or wrongful loss, or which causes harm in respect of property only.

The word 'dishonestly' appearing in s 420 of the Code implies a deliberate intention to cause wrongful gain, or wrongful loss and when this is tied up with cheating and delivery of property, the offence is punishable under this section. *Solomon Ezekiel* (1939) 69 CLJ 298; 41 Cri LJ 255; AIR

1939 Cal 376 is authority for the proposition that the requirement of dishonesty is satisfied if there was an intention to make wrongful gain on the part of the person cheating even if there was no intention to cause wrongful loss to the person cheated. It is significant to note and to lay stress that the dishonest intention must either precede or accompany the act of dishonesty: *Hemraj* (1910) 11 Cri LJ 295.

The salient evidence

Evidence was led before the trial court that Shetraco Trading Sdn Bhd ('Shetraco') was a company incorporated on 7 April 1980. The objects of Shetraco as reflected in the memorandum and articles of association (exh P2) were, inter alia, 'to ... carry on ... import, export and deal in timber, wood and rattans of all kinds in the manufacture of which timber or wood or rattan is used'. According to exh P18, the managing director of Shetraco was none other than the second appellant whilst the general manager was the first appellant. The prosecution successfully led evidence to show that Shetraco was in fact operated by both the appellants. The witness by the name of Koh Poh Chuan (SP22), who held the position of an assistant executive officer of UMBC, testified that Shetraco maintained an account with UMBC vide Account No 6779 which was opened on 9 June 1981. The signatories to the said account were both the appellants and one other by the name of Hassan bin Mohamed. There was also evidence that apart from the normal banking transactions, Shetraco had and used to present shipping documents under letters of credit to UMBC for negotiations.

The intricacies of the letters of credits

A number of witnesses gave evidence on how a letter of credit works. Suffice for this exercise if reference is made to the evidence of Zulkifli bin Mohd Fadhil (SP7), a bank officer in the import and export section of Hongkong Shanghai Banking Corp ('HSBC'). He testified that a letter of credit is normally opened by a buyer (usually a foreign buyer) with their bankers in their country for a specified sum. The letter of credit enables the buyer to pay for the goods purchased in another country through that bank. In short, a letter of credit guarantees the seller the payment for the goods sent. The letter of credit would be transmitted to the beneficiary who would then present the letter of credit with the relevant documents required to the negotiating bank. After the negotiating bank had negotiated the letter of credit, the original documents would be transmitted to the bank that opened the letter of credit. It is only when the documents are found to be in order and in conformity with the terms in the letter of credit the customer is informed and requested to pay for the amount stated.

Evidence was led to show that the complainant Ram Pancholia (SP14) had business dealings with Shetraco. Ram Pancholia sent a letter on 5 May 1981 to Shetraco and requested for quotations for certain grades of commercial plywood (exh P106). In response, he received a telex from Shetraco (exh P107) with the necessary quotations and confirmation of

ability to ship within 45 days. From the evidence, it would appear that right from the outset the appellants were aware that time was of the essence. Sometime later, Ram Pancholia went to Singapore and visited Johor Bahru and there he met both the appellants. Discussions were then conducted and agreements were entered to buy plywood from Shetraco. This resulted in the establishment of three letters of credits.

The first letter of credit relating to the first charge was exh P26. Through Tulla Tanagalpotmol (SP18), a banker with the Arab Bank Ltd Sharjah, Dubai it was established that the buyer by the name of Rashid Obaid Al-Shamsi wanted to buy 2,000 sheets of 18 mm x 4 feet x 8 feet commercial plywood grade DBB/CC at the price of US$32,240. The letter of credit was opened with Arab Bank Ltd and the advising bank was the Bank of America. The negotiating bank was United Malayan Banking Corp ('UMBC'). The necessary documents were presented to UMBC together with the letter of credit and after the letter of credit was negotiated, the documents were subsequently sent to Tulla Tanagalpotmol. The documents included:

(a) bill of lading (exh P148);

(b) invoice (exh P118);

(c) certificate of origin (exh P14); and

(d) packing list (exh P119).

The second letter of credit in relation to the second charge was exh P24. Now, according to Mahendran Buchan (SP16), a banker with the British Bank of the Middle East, the letter of credit was opened by an individual by the name of Mohd Abdulrehman Zarwani. The letter of credit was established for the purchase of 6,000 sheets of 12 mm x 4 feet x 8 feet commercial plywood grade DBB/CC at the price of US$71,328. The advising bank was HSBC and the negotiating bank was UMBC. The relevant documents that were required to be produced together with the letter of credit were in fact produced and these included:

(a) bill of lading (exh P150);

(b) invoice (exh P124);

(c) certificate of origin (exh P16);

(d) packing list (exh P123); and

(e) advice for shipment (exhs P122 and P122A).

On receipt of these documents, Mahendran Buchan counter-checked them with the letter of credit and he found them to be in order. This prompted him to inform the customer that the documents were received. The customer's account was then debited.

The third letter of credit (exh P28) was in regard to the third charge. Here, the prosecution relied on the evidence of P Sathia Narayanam (SP17), a banker with the National Bank of Sharjah. He gave evidence that a customer by the name of Ahmed Mohd Rafie Hoormodi applied for the letter of credit for the sum of US$17,120 to purchase 1,000 sheets of

18 mm x 4 feet x 8 feet commercial plywood grade DBB/CC. On record, the advising bank was the Bank of Canton Ltd while the beneficiary was Shetraco. The documents presented together with the letter of credit were:

(a) bill of lading (exh P149);
(b) invoice (exh P114);
(c) certificate of origin (exh P17); and
(d) packing list (exh P112A).

The certificates of origin

On perusal of these certificates of origin which were issued by the appellants, one would immediately note the following facts. That the appellants sought to claim that the plywood was manufactured by Tropical Veneer Co Ltd, Kuala Terengganu, Malaysia and that the goods were 100% Malaysian of Malaysian origin. The prosecution had succeeded in proving beyond reasonable doubt that the appellants did not purchase the plywood from Tropical Veneer Co Ltd, Kuala Terengganu, Malaysia. Goh Kok Yin ('Goh') (SP21), a sales co-ordinator with Tropical Veneer Co Ltd, Kuala Terengganu, Malaysia testified that the company had no business dealings whatsoever with Shetraco. He testified that he should know as he was the only one in the company that handled sales. He did say that had there been any dealings, it would certainly be reflected in the company's records. He was categorical when he testified before the trial court that he could not find any record of any dealings with Shetraco. When shown the certificates of origin in exhs P14 and P17, he remarked that if Tropical Veneer Co Ltd had supplied the plywood, the certificates of origin would have to be signed by them. Goh admitted that the first appellant had visited their factory at the end of 1992 and intended to purchase all the plywood in the factory. Goh testified that he told the first appellant that the company already had outstanding orders which they could not fulfil and, consequently, the first appellant's order was not accepted.

Choo Yow Meng (SP12), the sales manager of Starlite Timber, gave evidence that between the period of June and August 1981 his company had eight business dealings with Shetraco. He testified that throughout these eight business dealings, the consignments were plywood measuring 3 mm, 3.6 mm, 4 mm, 5 mm, 5.5 mm, 6 mm, 9 mm and 12 mm. He testified rather categorically that there were no consignments for the supply of 6,000 sheets of 12 mm x 4 feet x 8 feet commercial plywood, grade DBB/CC with shipping marks Anson/Zarwani/Sharjah.

Choo Lai Choo (SP13), the business manager of Kranji Plywood Pte Ltd, testified that there were business dealings with Shetraco on two occasions. On these two occasions, the consignments were related to:

(i) 8,000 sheets of commercial plywood of 12 mm x 4 feet x 8 feet;
(ii) 3,450 sheets of commercial plywood of 12 mm x 4 feet x 8 feet; and
(iii) 1,000 sheets of commercial plywood of 18 mm x 4 feet x 8 feet.

Unfortunately, these consignments according to Choo were sent on board the Maldive Nation and not the steamer MV Sim Lee or Fellow Well. It was the submission of Datin Amelia Tee that the certificates of origin contained false particulars as no plywood was purchased from Tropical Veneer Co Ltd, Kuala Terengganu, Malaysia. Although there was evidence that plywood was purchased from Kranji Plywood Pte Ltd, it had been established that these consignments were not related to the three charges for three different reasons: firstly, the amount of plywood was different; secondly, the shipping marks were different; and thirdly, the consignment sent was different.

Bills of ladings

Exhibits P148, P149 and P150 were the three bills of ladings issued by Maginco Shipping Lines Pte Ltd. It was established that Robert Chin was the owner and operator of Maginco Shipping Lines Pte Ltd. These three bills of ladings were all issued on 11 June 1981 and purported to show that the goods (as stated in these three bills of ladings) had in fact been loaded and put on board the steamer MV Sim Lee.

The movements of the steamer MV Sim Lee were amply adduced through Au Yong Peng Leong (SP11), the marine port officer with the Port Authority of Singapore. He testified that the steamer MV Sim Lee arrived at the port of Singapore on 14 May 1981 and anchored at various anchorages in Singapore without leaving for any country until she was placed under arrest in November 1981. Before the trial court, Au Yong Peng Leong produced the Inward/Outward Manifest of Cargo (exh P92) which was a damning piece of evidence. Exhibit P92 showed beyond reasonable doubt that the three bills of ladings with the following particulars:

(i) SL 613/81 for 2,000 sheets of 18 mm x 4 feet x 8 feet, commercial plywood grade DBB/CC with shipping marks Shetrade/Ansons/Dubai (exh P148);

(ii) SL 610/81 for 1,000 sheets of 18 mm x 4 feet x 8 feet, commercial plywood grade DBB/CC with shipping marks Ansons/Rafie/Sharjah (exh P149); and

(iii) SL 636/81 for 6,000 sheets of 12 mm x 4 feet x 8 feet, commercial plywood grade DBB/CC with shipping marks Ansons/Zarwani/Sharjah (exh P150),

were not listed as cargoes on board the steamer MV Sim Lee. Flowing from this, Datin Amelia Tee argued that the prosecution had adduced sufficient evidence to show that the goods as described in the bills of ladings in exhs P148, P149 and P150 were not purchased nor loaded on board the steamer MV Sim Lee. It was sought to argue that the evidence of Au Yong Peng Leong was reinforced by the cogent evidence of Capt Francis Koh (SP4) as seen at p 147 of the appeal record. As the managing director of Consolidated Services (P) Ltd, Capt Francis Koh was in a position to testify and he testified that in 1981, he received a court order (exh P188) directing him to discharge the cargo from the steamer

MV Sim Lee and deliver the same to the claimants thereof and the balance to the warehouse. Captain Francis Koh testified that when the cargo was discharged from the steamer MV Sim Lee a complete and thorough survey was carried out of the cargo therein by a firm of surveyors known as 'Marine Survey Associates'. A final list of the cargo discharged from the steamer MV Sim Lee was made and checked by an international firm of auditors known as 'P Marvin and Mitchell' (see p 148 of the appeal record).

Yesuphasan s/o Wilfred Devarajah (SP25), a marine surveyor with Marine Survey Associates testified for the prosecution. His evidence was short and he was not cross-examined at all (see pp 151 and 152 of the appeal record). He testified that he was given a copy of the manifest of the steamer MV Sim Lee and he was asked to survey the goods unloaded from the vessel. His evidence was clear, categorical and unchallenged and that was that the goods as stated in the bills of ladings in exhs P148, P149 and P150 were not in the godown. From this, it can be inferred that the goods as itemized in exhs P148, P149 and P150 were never loaded on board the steamer MV Sim Lee. In my judgment, the evidence of Robert Chin that the goods were on board the steamer MV Sim Lee could not have been true as his evidence went against the grain of the testimony of Yesuphasan s/o Wilfred Devarajah, whose evidence was not even challenged by Robert Chin and both the appellants. I have no reasons to doubt the testimony of Yesuphasan s/o Wilfred Devarajah and I unhesitantly accepted his testimony as the truth. In my judgment, when Robert Chin testified that the goods were on board the steamer MV Sim Lee, that was evidence tainted with lies. Robert Chin had the audacity to say that the goods had been loaded onto the steamer MV Sim Lee as the evidence of the first appellant clearly went in the opposite direction. References to certain pieces of evidence of the first appellant clearly put Robert Chin in a different light entirely. For a start, at p 200 of the appeal record, the first appellant put the blame entirely on Robert Chin. This was what the first appellant said:

> I checked with Robert Chin and [found] that there were no goods on board the ship.

On the same page of the appeal record, the first appellant said in succession:

> ... I received information that the goods had not reached Dubai.
>
> Then I suspected something was amiss.

At p 201 of the appeal record, the first appellant was reported to have said:

> When we find [found] out [that] the goods were not loaded, we dared not inform Ram Pancholia; instead we tried to get an alternative supplier to replace the goods in the letters of credit.

Again at p 213 of the appeal record, the first appellant testified:

> I came to know [that] the goods were not on board, when the vessel got stuck in Singapore.
>
> Before we found out [that] the goods were not on board, Maginco informed us [that] there were some technical problems with the vessel.

A It cannot be doubted that the first appellant was afraid and he expressed his fear in this way as can be seen at p 214 of the appeal record:

> We were shocked [that] the goods were not there. We were afraid of a civil claim. We tried to get alternative supplies first before I told the truth to him [meaning Ram Pancholia].

B The second appellant had no redeeming features to highlight. He was just like Robert Chin. At p 245 of the appeal record, the second appellant testified:

> I do not know [that] the goods were not delivered to Sim Lee. I only knew of it when I was arrested ... . I deny that I am lying as alleged by the
C prosecution.

However, as evidence unfolded it was apparent that the second appellant lied when he testified at p 234 of the appeal record that the transaction with Kranji Plywood Pte Ltd was successful when the plywood was sent to the ship. Choo Lai Choo (SP13) testified, as adverted to earlier, that the
D consignments went on board the Maldive Nation and not the steamer MV Sim Lee or Fellow Well. The ship as mentioned in the charges was the steamer MV Sim Lee and not the Maldive Nation.

If it was true that the goods were actually on board the steamer MV Sim Lee, as alleged by Robert Chin, why wasn't Yesuphasan s/o
E Wilfred Devarajah cross-examined on this point? Failure to cross-examine and put forward a vital point in the defence case clearly showed that that defence was a mere afterthought coined in the last minute by Robert Chin.

Packing lists and invoices

F Since the evidence adduced showed that the goods as listed in exhs P148, P149 and P150 were in fact not loaded on board the steamer MV Sim Lee, it was the submission of the learned deputy public prosecutor that the packing lists and the invoices contained false particulars. Indeed this was the correct submission in the context of the available evidence that was advanced before the trial court. It was my finding which formed part and
G parcel of this judgment that all the documents presented together with the letters of credits, namely:

(a) bills of ladings;

(b) invoices;

H (c) certificates of origin; and

(d) packing lists,

were made in order to convince and deceive UMBC into believing that all the terms of the letters of credits had in fact been complied with. That was deception of the first degree orchestrated by both the appellants.

I

The inward/outward manifest of cargo (exh P92)

A point was advanced in the petition of appeal (at p 7 of the appeal record) to the effect that the manifest tendered by Au Yong Peng Leong (SP4) was

not proved to be an outward manifest. It must not be forgotten that Au Yong Peng Leong was an officer with the Port of Singapore Authority and in that position he had access to the documents which he produced before the trial court. Even though Au Yong Peng Leong was unable to say for certain whether the manifest (exh P92) was an inward or onward manifest, it was not a very material negativing effect. It merely showed the cautiousness that this witness adopted while giving evidence before the trial court. It is perhaps appropriate to examine exh P92. That exhibit carried the following caption:

> Maginco Shipping Line Pte L.
> Manifest of Cargo Shipped per MV *Sim Lee* Dwt *5866* from *Singapore.*
> Master *Shin Cheng Yi* Arrival Date ..... .

Then, under two columns 'Shippers' and 'Consignees', the particulars recorded therein showed that the shippers were all located in Singapore while the consignees were to the order of various foreign banks. Looking at exh P92 and taking a hard look at the evidence of Au Yong Peng Leong, one would arrive at the inescapable conclusion that there was no record that the steamer MV Sim Lee had ever left Singapore. Au Yong Peng Leong was categorical when he testified that the steamer MV Sim Lee was anchored at various anchorages in Singapore without leaving for any country until she was placed under arrest. It was therefore safe to conclude that exh P92 was an outward manifest.

Mr Karpal Singh, the learned defence counsel for both appellants, submitted that the unloading manifest produced as exh P154 by Ram Pancholia was not properly proved. Now, Ram Pancholia testified that after the cargo had been unloaded from the steamer MV Sim Lee, he was given a manifest by his counsel. He testified that none of the three consignments that he ordered was in the manifest. It is pertinent to note that when exh P154 was tendered and marked accordingly there was not even a whimper of objection as reflected from p 96 of the appeal record. At any rate, even if exh P154 was disregarded there was still ample evidence to prove that the three consignments were not on board the steamer MV Sim Lee.

Common intention

Mr Karpal Singh argued that the trial court made a serious omission in not considering s 34 of the Code as that was an important ingredient to the three charges levied against both the appellants. The Indian Privy Council case of *Mahbub Shah v King Emperor* 72 IA 148 discussed the effect of s 34 of the Code in these terms (at p 153):

> To invoke the aid of s 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies

A a pre-arranged plan; and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

B In my judgment, from the totality of the evidence adduced before the trial court, there was an element of common intention on the part of the appellants to commit the offence. In essence, there was joint liability on the part of both the appellants in doing the criminal act. In the context of the present appeal, common intention can be seen from the conduct of C both the appellants who were the managing director and general manager of Shetraco. They were the personalities who concluded the agreements with Ram Pancholia for the supply of plywood. Through Insp John Cantius (SP30) at p 166 of the appeal record, the cautioned statement of the second appellant was tendered as exh P205 without an objection from the counsel that acted for the second appellant then. Again through Insp Philip D Yeow Boon Bee (SP31), the cautioned statement of the first appellant was admitted as exh P206 without an objection from the counsel that acted for the first appellant as can be seen at p 168 of the appeal record. These cautioned statements showed that the appellants needed the money to purchase two ships — Sim Lee and Common Wealth. Both the appellants E in their testimonies before the trial court adverted to their desire to purchase these two ships on equal partnership with Maginco Shipping Lines Pte Ltd. They were both enthusiastic about the venture. According to the first appellant, Maginco Shipping Lines Pte Ltd — meaning Robert Chin — failed to pay its share of 50% towards the vessel (see p 203 para C of the appeal record). In my judgment, to fulfil the desire to purchase the F two ships, both the appellants collaborated with Robert Chin to deceive UMBC into believing that the consignments of plywood were packed and loaded on the steamer MV Sim Lee. It was an incorrect assertion to say that the trial court did not consider s 34 of the Code. At p 287 of the appeal record, the trial court did say:

G From the evidence adduced therefore the court is of the view that the first, second and third accused had clearly conspired and by their common intention [ie to buy the ship] had negotiated the LC by putting in documents knowing [that] they do not contain true facts.

The court finds that the first and second accused [referring to both the H appellants] collaborated with the third accused [referring to Robert Chin] to induce UMBC to negotiate and deliver sums of money ... .

And from this brief recital, it would appear that the trial court did consider s 34 of the Code.

I *The failure to call the investigating officer*

An argument was advanced relying on the case of *Teoh Hoe Chye v PP; Yeap Teong Tean v PP* [1987] 1 MLJ 220 that the failure of the prosecution to call the investigating officer by the name of Abdul Hamid bin Abdul

Kadir had caused a serious break in the chain of evidence relating to the identity of the exhibits. It was also argued that the calling of the investigating officer by the defence cannot cure the fundamental infirmity in the prosecution's case as the prosecution's case cannot be supplemented by the defence as the burden was throughout on the prosecution to prove its case beyond reasonable doubt at the close of its case after a maximum evaluation of the evidence along the principles enunciated by *Arulpragasan*. With respect, the case of *Teoh Hoe Chye* can be differentiated from the present appeal. There, it was a case where Supt Lum Weng Foo received the bag which was believed to contain the drugs and since the said superintendent who was the investigating officer was not called to give evidence, thus no evidence was led as to what the said superintendent did with the exhibits. There, the drugs were the subject matter of the charge and its movements were vital links to convict the appellants. Here, the exhibits were entirely documentary and it was not fatal on the part of the prosecution in not calling the investigating officer. It is pertinent to point out that the investigation diary of the investigating officer was tendered and marked as exh P226 and whatever the investigating officer did in regard to the case was amply set out therein. Unlike exhibits like drugs, documentary exhibits like in the present appeal would not suffer from an impediment as to its identity. It was totally unnecessary to ensure that there was no break in the chain of evidence in regard to documentary exhibits. It seemed that the investigating officer did not attend the unloading of the cargo from the steamer MV Sim Lee and his role can therefore be said to be minimal. It was also argued that the Singapore police investigated the case and yet the prosecution failed to call Sgt Seow Hong Lee of the Singapore Commercial Crime Division. It was in evidence that the investigating officer enquired from his Singaporean counterpart about Robert Chin's partner and was told that he was not available. It was urged upon me that Sgt Seow Hong Lee was a material witness. The crucial question to ask would be whether the failure to call a particular witness gave rise to a serious gap in the prosecution's case. In the context of the present appeal, the answer would be in the negative. At any rate, the petition of appeal did not specifically itemize the non-calling of these two individuals as a ground to support the appellants' appeal. I have said in *Yan Wing Lee v PP* [1994] 2 CLJ 453 especially at p 457 to this effect, which must surely apply to the present appeal:

> From the authorities cited above, the legal situation appears to be that the appellant must abide by the petition of appeal and the learned counsel for the appellant, in all fairness to the learned deputy public prosecutor should submit solely on the points of law or fact as set out in the petition of appeal and should not dabble on points of law or fact not set out in the petition of appeal. In my judgment, s 307(vi) of the Criminal Procedure Code (FMS Cap 6) is couched mandatorily and any failure to observe it would be fatal. In the circumstances, this court is entitled to disregard the grounds that were not itemized in the petition of appeal.

Further down the same page, I did say:

A However, I must signal a warning that in future, failure to abide to the mandatory requirements of s 307(vi) of the Criminal Procedure Code (FMS Cap 6) would mean dismissal of the appeal forthwith.

Was it cheating or breach of contract?

B The first appellant (DW1) took the stand and gave evidence that he ordered a supply of plywood from Tropical Veneer Co Ltd through Bernas Jaya Sdn Bhd. The first appellant claimed that the contract was made through a person by the name of Mak Foon Tham. When the first appellant discovered that the goods were not on board the steamer MV Sim Lee, he tried to get an alternative supply from Kranji Plywood C Pte Ltd. This was done after the letters of credits and the relevant documents had already been presented to UMBC for payment. It was through this evidence that the appellants contended that there was no criminal intent and that they were only liable for breach of contract. That was a novel line of defence.

D It is trite law that mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act. The most essential ingredient that has to be proved by the prosecution is the fact that the complainant was cheated and thereby induced to deliver E money to the accused.

Datin Amelia Tee submitted that the defence story of purchasing plywood from Bernas Jaya Sdn Bhd for these transactions was totally unsupported by the evidence. Indeed, this was a correct submission as the meeting in which Mak Foon Tham talked about contracts valued at F $800,000 was held on 15 June 1981. The three bills of ladings (exhs P148, P149 and P150) stated that the goods were loaded on 11 June 1981. Furthermore, exh D220 (the minutes of the First Board of Directors Meeting of Bernas Jaya Sdn Bhd dated 15 June 1981 at 10am) at item 6 para 2 referred to timber and not plywood. Thus, even if Shetraco had any G dealings with Bernas Jaya Sdn Bhd, they were totally of a different nature and had nothing to do with the supply of plywood in respect of the three letters of credits referred to earlier. In my judgment, the prosecution had proved beyond reasonable doubt that the appellants had fraudulent or dishonest intention at the time when they presented the letters of credits together with the supporting documents that they were not true in material H particulars. It was also my judgment that no plywood had in fact been purchased from Tropical Veneer Co Ltd and that no plywood had been packed nor laden on board the steamer MV Sim Lee. In my judgment, when the appellants produced those supporting documents together with the letters of credits, it merely sought to show that the consignments of plywood had been loaded onto the steamer MV Sim Lee, which was in fact I not the case, and by deception the appellants had induced UMBC to pay the sums of money as stipulated in the three charges which amounted to a grand total of US$122,688. In my judgment, the appellants knew that

the documents contained false particulars as they orchestrated the deception professionally. There is a subtle distinction between a mere breach of contract and cheating. It is dependent on the intention of the wrongdoer at the time of the alleged inducement and it is judged by simply assessing the facts of the whole case. In my assessment of the factual matrix of the whole case, it was clearly a cheating case and not a mere breach of contract. As Jagannadhadas J said in the case of *Mobarik Ali Ahmad v State of Bombay* AIR 1957 SC 857 at p 863:

> In a case of this kind, a question may well arise at the outset whether the evidence disclose only a breach of civil liability or a criminal offence. That, of course, would depend upon whether the complainant in parting with his money to the tune of Rs 5½ lakhs acted on the representations of the appellant and in belief of the truth thereof and whether those representations when made were in fact false to the knowledge of the appellant and whether the appellant had a dishonest intention from the outset.

It must not be forgotten and emphasis must be made that an intention to cheat can only be gathered from the surrounding circumstances and no direct evidence is possible to ascertain the intention of the accused (*State of Orissa v Laba* (1964) Cut LT 253 at p 260). In my judgment, the documents presented by the appellants to UMBC did not contain true facts and the appellants knew about it. It was as a result of these representations that UMBC was deceived and parted with those sums of money which they would not have done had they not been deceived. In my judgment, the representations were made with false facts and this was done with knowledge of the appellants. For these reasons, I had no choice but to confirm the decisions of the trial court. The convictions of the first appellant on all the three charges must and should be confirmed forthwith. Likewise, the convictions of the second appellant on all the three charges were accordingly affirmed. In categorical terms, the guilt of the appellants as found by the trial court was correct in law and in fact. I have given a careful and anxious consideration on all the points raised in favour of the appellants and I am of the view and it was my judgment that the evidence led by the prosecution before the trial court was overwhelmingly strong and cogent. Legally speaking, the prosecution had adduced evidence in accordance with the burden of proof as envisaged in *Arulpragasan*.

Sentencing

No reasons were advanced by the trial court in sentencing the appellants. Mr Karpal Singh took exception to this. A perusal of the appeal record clearly showed that the trial court had duly considered in the grounds of judgment the mitigation of the both the appellants before passing sentence. The mitigating factors as outlined by the learned defence counsel were laboriously recorded by the trial court as was the submission of the prosecution for a deterrent sentence. Before the trial court, the prosecution pressed for deterrent sentences. It was submitted before the trial court and before me that the trial was protracted with a total of 31 witnesses who gave evidence. It was said to be a costly affair for the taxpayers. It was

impressed upon the trial court that a total sum of US$122,688 an equivalent of RM1.4m was involved. It was argued that foreign businessmen were cheated by the appellants and that very conduct tarnished not only the image of Malaysia generally but it could sour relations between Malaysian businessmen who were currently doing businesses with other foreigners. Hopefully, the repercussions of what the appellants did would not extend globally.

I now invite both the appellants and Datin Amelia Tee to address me on the appropriate sentences to impose on each of the appellants. I have since considered all the points raised by both parties and I need to say that sentencing is not an easy subject to handle. The interests of both the appellants must be balanced with the concept of public interests. That the appellants had the charges hanging over their heads since 1981 should be taken into account. The appellants must have suffered all these years for the crime they committed and they cannot blame anyone for their folly. Public interest must be emphasized and vigorously applied in the present appeal. The object of deterrence is to punish the wrongdoer so that he repents and will not commit the offence again. The object is twofold: to deter the offender himself from committing offences in the future and to deter other offenders from committing the same offence. I am reminded of what Wan Yahya J (later FCJ) said in the case of *New Tuck Shen v PP* [1982] 1 MLJ 27 when his Lordship said to this effect (at p 29H–I):

> ... The right to impose punishment on a guilty party is absolutely the discretion of the court. It will exercise that power judicially but will not tolerate any encroachment or even semblance of encroachment either by the prosecution or the defence in respect of such right.

The sentences that I am about to pass should, apart from reflecting the gravity of the particular offence, act as a deterrent to would-be violators. I did say in *PP v Mansor bin Md Rashid & Anor* Criminal Trial No 58–10–92 (unreported) the following:

> Deterrence has all along taken a prominent role in the sentencing policy (*R v Ford* [1969] 3 All ER 782).
>
> It is universally recognized that in fixing the punishment for any particular offence, the court will take into consideration its nature and the surrounding circumstances in which it was committed. Ashurst J in *R v Stratton* (1780) 21 State Tr 1045 at p 1291 said that 'the fundamental rule of criminal judicature is that the measure of punishment should be in proportion to the malignity appearing in the intention of the offender'.

At p 290 of the appeal record, it was recorded therein that each of the appellants was put on bail of RM10,000. Section 420 of the Code as it stood by way of an amendment on 17 September 1993 vide Amendment Act A860 and still in force now enacts as follows:

> Whoever cheats and thereby dishonestly induces the person deceived, whether or not the deception practised was the sole or main inducement, to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which

> is capable of being converted into a valuable security, shall be punished with imprisonment for a term which shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine.

It is clear from s 420 of the Code that whipping is mandatory and the trial court did not order whipping to be imposed. Fortunately for both appellants, s 289(c) of the CPC would spare them the torment of being whipped even though they deserved to be whipped. For once, the privilege of being more than 50 years of age can be fully appreciated. But the offences were committed on or about 24 June 1981 (the first charge), on or about 1 July 1981 (the second charge) and on or about 16 June 1981 (the third charge); and at that time, s 420 of the Code was worded thus (incorporating all the amendments as at 15 July 1991):

> Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine.

As can be seen, whipping was not provided for in the then s 420 of the Code. I have with me a copy of the translated version of the Code. It is entitled 'Kanun Keseksaan (NMB Bab 45)' which incorporates all the amendments until 1 April 1965 and of pertinence s 420 enacts as follows:

> Barang siapa menipu dan dengan jalan demikian itu mendorong dengan curangnya orang yang terpedaya itu supaya menyerahkan apa-apa harta kepada mana-mana orang, atau supaya membuat, mengubah, atau membinasakan kesemua atau apa-apa bahagian sesuatu cagaran berharga, atau apa-apa yang bertandatangan atau bermeteri, dan yang boleh dijadikan suatu cagaran berharga, hendaklah diseksa dengan penjara selama tempoh yang boleh sampai tujuh tahun, dan bolehlah juga dikenakan denda.

It is now apparent that the punishment as set out in s 420 of the Code has undergone amendments over the years. From imprisonment 'selama tempoh yang boleh sampai tujuh tahun, dan bolehlah dikenakan denda', it was increased to 'for a term which may extend to ten years, and shall also be liable to fine' and was then raised and increased to 'for a term which shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine'. Datin Amelia Tee informed the court that the sentence of imprisonment 'selama tempoh yang boleh sampai tujuh tahun, dan bolehlah dikenakan denda' was increased to imprisonment 'for a term which may extend to ten years, and shall also be liable to fine' by Amendment Act A727/89 which came into effect on 5 May 1989. This meant that in reckoning the appropriate sentence, reference must be made to the translated version of the Code and the range of sentencing would be in this direction:

> ... hendaklah diseksa dengan penjara selama tempoh yang boleh sampai tujuh tahun, dan bolehlah juga dikenakan denda.

The translated version of s 420 of the Code gives the limit to which a sentence can be passed but that does not mean that a maximum sentence should be awarded in each case. The extent of the punishment has to be judged upon the circumstances of each case (*Jainarain Sah v Emperor* AIR 1944 Pat 16). The court should not award the maximum punishment laid down for an offence, but should apportion the punishment in each case after considering all the circumstances having a bearing upon it (*Kher Singh v Emperor* (1928) 30 Punj LR 638). The court must always bear in mind the necessity of proportion between an offence and the penalty (*Adamji Umar v Bombay State* AIR 1952 SC 14). It is the bounden duty of the court to apply its mind to the quantum of punishment to be awarded in a particular case and decide it after the due consideration of all the relevant circumstances (*Dulla v State* AIR 1958 All 198). It must not be forgotten that no hard and fast rule can be laid down for measuring what in a particular case would be a proper sentence, but the courts are expected to observe a desirable proportion between the gravity of the offence and the punishment for it (*State of Kapur Singh* (1953) Cr LJ 1261). It is beyond dispute that the quantum of punishment to be awarded in a particular case lies at the discretion of the court (*Shanmuga Koduman v Emperor* 31 Cr LJ 477) but that discretion has to be exercised judicially and the punishment should not be either too lenient (*Siba Prasad Moda v State of Orissa* AIR 1951 Orissa 259) or too severe (*Nanhi Gond v Emperor* AIR 1927 Nag 221). The punishment that should be imposed must be proportionate and according to the guilt of the accused (*Madan Lal v State of Maharashtra* AIR 1968 SC 1267). It is now an elementary proposition in criminal jurisprudence that sentence in each case should be proportionate to the nature and gravity of the crime (*Emperor v Maiku* AIR 1930 All 279). Public interest must be emphasized and when the court awards the maximum sentence provided by law, it should record reasons for doing so (*Harnam Singh v Emperor* AIR 1926 Lah 239). These general principles were vigorously applied when reviewing the sentences imposed by the trial court on both the appellants.

There was no cross-appeal by the learned deputy public prosecutor against inadequate sentence. For the reasons adumbrated above, I am constrained to interfere with the sentences and I varied and substituted the sentences imposed as follows:

The first appellant

First charge: Two years' imprisonment and a fine of RM5,000 in default one year's imprisonment.

Second charge: Two years' imprisonment and a fine of RM10,000 in default one year's imprisonment.

Third charge: Seven years' imprisonment and a fine of RM5,000 in default one year's imprisonment.

These sentences must run concurrently, effectively from today.

The second appellant

First charge: Two years' imprisonment and a fine of RM5,000 in default one year's imprisonment.

Second charge: Two years' imprisonment and a fine of RM10,000 in default one year's imprisonment.

Third charge: Two years' imprisonment and a fine of RM5,000 in default one year's imprisonment.

These sentences must run concurrently, effectively from today.

Appeal dismissed.

Reported by Zahid Taib